

STATE OF SOUTH CAROLINA
BEFORE THE PUBLIC SERVICE COMMISSION

Docket No. 2021-349-E

In the Matter of:)	
Joint Petition of Duke Energy Carolinas, LLC)	OPPOSITION OF GOOGLE,
and Duke Energy Progress, LLC to Request the)	LLC TO DUKE ENERGY
Commission to Hold a Joint Hearing with the)	CAROLINAS, LLC'S AND
North Carolina Utilities Commission to Develop)	DUKE ENERGY PROGRESS,
Carbon Plan)	LLC'S MOTION TO RECUSE
)	
)	<u>Hearing Requested</u>
)	
)	

Pursuant to S.C. Code Ann. Regs. § 103-829(A), Google, LLC (hereinafter, “Google”), through undersigned counsel, hereby submits its Memorandum in Opposition to Duke Energy Carolinas, LLC’s and Duke Energy Progress, LLC’s (collectively, “Duke”) Motion to Recuse Commissioner Thomas J. Ervin (the “Motion”). The Public Service Commission of South Carolina (the “Commission”) should summarily deny the Duke Motion for, among other reasons, providing no legal or factual basis on which to justify recusal. Further, Google hereby requests oral argument on the Motion, in order to allow Commissioner Ervin and the Commission the benefit of input from all parties on this issue prior to any decision being made on the Motion.

INTRODUCTION

Duke, having in its Petition for Joint Proceeding (the “Petition”) already proposed that the State of South Carolina effectively be treated as junior to both Duke Energy and North Carolina’s legislature in the formation of South Carolina’s energy policy, which if agreed to would greatly reduce this Commission’s authority, now turns its attention to obliterating any perceived opposition on the Commission to its Petition, as a means of ensuring the outcome in this Docket

that Duke seeks. Duke might as well simply ask the Commission to hand Duke the pen to write the ultimate opinion in this Docket, rather than having the Commission and parties bother with all the intermediate steps of this proposed “joint proceeding.” Just as Duke’s Petition broadly seeks to undermine the sovereignty of the State of South Carolina, Duke’s Motion to Recuse Commissioner Ervin strikes more precisely at the legal authority of this Commission and the independence of each Commissioner. As such, and as explained further below, this Commission should decisively deny Duke’s Motion.

BACKGROUND

On November 9, 2021, Duke filed the Petition in the above-captioned proceeding with the Commission seeking to hold a “joint proceeding” with the North Carolina Utilities Commission (the “NCUC”) in connection with Duke Energy’s need to develop a Carbon Plan under North Carolina law.¹ On November 10, 2021, the Commission opened the above-captioned docket. That same day, Duke submitted its request for an allowable *ex parte* briefing. Google, among other parties, objected to the request for *ex parte* briefing on the basis that the briefing was an improper effort to advocate to the Commission regarding the merits of a pending matter. *See* S.C. Code Ann. § 58-3-260(C)(6)(a)(iii)(effectively prohibiting briefings from influencing commissioners’ decision on issues in a proceeding). At the November 18, 2021 special business meeting that is the subject of Duke’s Motion (discussed further below), Duke’s request for *ex parte* briefing was granted for the following day—November 19, 2021. As predicted by Google, Duke and its representatives used the *ex parte* briefing as an uninterrupted chance to advocate explicitly and improperly for itself on the ultimate matter at issue in this proceeding—whether to order a “joint proceeding.”

¹ N.C. Gen. Stat. §§ 62-2, 62-30, Part I of Session Law 2021-165 (“HB 951”).

Returning to the November 18, 2021 special business meeting, Commissioner Ervin questioned whether the Duke Petition ought to be dismissed altogether for lack of jurisdiction, among other grounds.² In discussing the Petition, Commissioner Ervin further correctly explained that South Carolina has its own legal process for reviewing and approving a utility's integrated resource plans, and that North Carolina has its own process which is the subject of its state's laws. Moreover, Commissioner Ervin reminded the Commission of very recent South Carolina Supreme Court precedent which affirmed a decision prohibiting Duke from doing what it again seeks to do here—that is, to impose costs of complying with a North Carolina legislative mandate on South Carolina ratepayers.³

ARGUMENT

Duke's Motion makes the extraordinary allegation that Commissioner Ervin, by expressing his reasonable and well-founded views on South Carolina law as it relates to the Duke Petition, is in violation of the Code of Judicial Conduct, *see* Rule 501, SCACR, and should thus recuse himself. In Duke's apparent view of legal ethics, applying the law to question the legal and jurisdictional merit of a Duke request is unethical. Fortunately for the Commission, the parties, and ratepayers, Duke's view is not South Carolina law.

Indeed, there is no dispute that a judge or, in this case a commissioner, should consider disqualifying himself or herself in a proceeding in which personal bias or prejudice against a party might reasonably be questioned. *Murphy v. Murphy*, 319 S.C. 324, 461 S.E.2d 39 (1995). However, "bias" does not relate to a judge's views on the law or merits. In fact, the long-

² See www.scetv.org/live/public-service-commission.

³ *Duke Energy Carolinas, LLC v. South Carolina Office of Regulatory Staff*, 864 S.E. 2d 873, 894 (S.C. Sup. Ct. 2021)(affirming the Commission's decision not to require South Carolina customers to pay Duke Energy's costs of complying with North Carolina's Coal Ash Management Act of 2014).

accepted rule is that a “motion to recuse may not be predicated on the judge's rulings in the case before him or on rulings in a related case, nor on his demonstrated tendency to rule in any particular manner, or on a particular judicial leaning or attitude derived from his experience on the bench. *Id.* (emphasis added) (citing to *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966)). Rather, unfair “bias must stem from an extrajudicial source.” *Roper v. Dynamique Concepts, Inc.*, 316 S.C. 131, 447 S.E.2d 218 (Ct.App.1994). It is by no means sufficient for a party seeking disqualification merely to allege bias. *Mallett v. Mallett*, 323 S.C. 141, 145–46, 473 S.E.2d 804, 807 (Ct. App. 1996).

Yet that is precisely the allegation Duke makes here—that Commissioner Ervin’s expression of his legal view of the jurisdictional and substantive allegations related to the Duke Petition disqualifies him from participating. Why? Well, because Commissioner Ervin’s views are not Duke’s views. Still worse, Duke makes the unfounded *ad hominem* allegation that Commissioner Ervin has committed a violation of the Code of Judicial Conduct by raising the matter of jurisdiction. Nothing could be further from accurate. It is well-settled that lack of subject matter jurisdiction can be raised at any time and can be raised *sua sponte* by the court. *Nix v. Columbia Staffing, Inc.*, 322 S.C. 277, 280, 471 S.E.2d 718, 719 (Ct. App. 1996); *Ex parte Reichlyn*, 310 S.C. 495, 427 S.E.2d 661 (1993). Regardless of Duke’s complaints about the timing of such discussion, the fact is that Commissioner Ervin is well within his judicial role to ask whether the Commission should use its finite resources on a matter where it has no jurisdiction or authority to grant the relief requested by Duke. Knowing of a serious jurisdiction flaw, state and federal judges throughout South Carolina typically would raise the same questions for the same reasons.

Moreover, Commissioner Ervin's statements on the law as it relates to the Duke Petition are reasonable, well-supported and uncontroversial. For one thing, S.C. Code Ann. § 58-27-170 only permits the Commission to "hold joint hearings and issue joint or concurrent orders in conjunction or concurrence with" the commission of another state. (emphasis added) Nowhere does the statute allow for a "proceeding," much less a "joint proceeding." And, even if the Duke designed proceeding were considered a hearing, it would in no way be "joint." As put forward by Duke, the Commission would have no vote or voice in the proposed consolidated proceeding to be held at and run by the North Carolina Utilities Commission. As imagined by Duke, the proverbial "seat at the table" it keeps speaking of for the Commission and South Carolina would certainly not be at the main table, but rather at the children's table.

Apart from the form of the hearing, Duke's ultimate objective—an order predetermining that South Carolina ratepayers should shoulder the expense of Duke Energy's compliance with North Carolina HB 951—is one that cannot be granted. Commissioner Ervin is right that the very recent decision in *Duke Energy Carolinas, LLC v. South Carolina Office of Regulatory Staff*, 864 S.E. 2d 873, 894 (S.C. Sup. Ct. 2021) is directly on point. Just as Duke could not recover from South Carolina ratepayers for coal ash remediation costs directed under North Carolina law, South Carolina ratepayers cannot be saddled with an up-front prudence and cost allocation blessing as to North Carolina's policy choice on greenhouse gas reduction costs.

It is understandable why Duke would want to mold the Commission more into its likeness. Any party with business before the Commission or any tribunal wants its way. But having one's way by eliminating certain individuals and their views to achieve one's favorable outcome is anathema to an independent body tasked with a judicial function, like the Commission. Allowing Duke to selectively pick off commissioners with whom it disagrees would severely undermine

public confidence in the Commission's work. If that were allowed, the public would unfortunately and understandably assume that any commissioners not removed are "Duke approved." Such an outcome subverts and runs counter to the Commission's explicit mission: "To Serve The Public Of South Carolina By Providing Open And Effective Regulation And Adjudication Of The State's Public Utilities, Through Consistent Administration Of The Law And Regulatory Process." *See* the Commission's homepage at <https://psc.sc.gov/> (emphasis added).

CONCLUSION

For the foregoing reasons, Google opposes the Duke Motion and urges the Commission to deny Duke's request, which lacks legal or factual basis and, if allowed, would prejudice South Carolina and its ratepayers. Google's opposition is based upon the pleadings, applicable law, and any other material that may be submitted to the Commission before or at the hearing on this motion, which is expressly requested.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have caused to be served this day one copy of the **Google, LLC'S Memorandum in Opposition to Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's Motion to Recuse** to the persons named below at the addresses set forth via electronic mail and/or e-filing:

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